State of Rhode Island and Providence Plantations

**DEPARTMENT OF ATTORNEY GENERAL**
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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

October 28, 2016
PR 16-45

Mr. Peter Phipps

**Re: The Providence Journal v. Rhode Island Department of Corrections**

Dear Mr. Phipps:

The investigation into The Providence Journal's Access to Public Records Act ("APRA") complaint filed against the Rhode Island Department of Corrections ("DOC") is complete.[1]

The Providence Journal made an APRA request to the DOC seeking:

> "[A]ccess to the probation and parole files for [a specifically identifiable parolee whom we shall refer to as John Doe]. My records request includes, but is not limited to: [1] notices, orders or subpoenas sent to [John Doe] during 2014 and 2015 regarding his appearance in Rhode Island on matters related to his probation or parole, including notices of possible violations; [2] correspondence or notes from phone conversations about [John Doe] between Adrienne McGowan, Supervisor, Interstate Office, and [John Doe's father]; [3] records and/or correspondence about the terms of permission granted [John Doe] to leave Rhode Island for Florida to attend a drug treatment program on 2 occasions in 2014 and 2015; [4] correspondence about [John Doe's] case with Florida probation, parole or corrections officials during 2014 and 2015."

Initially, the DOC extended the time to respond to the APRA request an additional twenty (20) business days to respond, pursuant to R.I. Gen. Laws § 38-2-3(e). Thereafter, the DOC timely

[1] The initial APRA request to DOC was made by Staff Writer Lynn Arditi. The complaint was filed by Interim Executive Editor Susan Areson. Ms. Areson has since retired and Ms. Arditi has informed us that the finding should be addressed to Deputy Executive Editor Peter Phipps.

responded to the APRA request. In its response the DOC denied access to the probation and parole files, asserting:

> "The department do[es] not possess copies of orders or subpoenas in the file you have requested. [1] Notices, orders or subpoenas sent to [John Doe] during 2014 and 2015 regarding his appearance in Rhode Island on matters related to his probation or parole, including notices of possible violations. *** As to the request for notices, this information is not public pursuant to RIGL § 38-2-2(4)(A)(1)(b). *** Your request is specific to an individual, [John Doe]. Therefore, any documents produced will be personally identifiable to this individual. Redaction and/or segregation of identifying information (i.e. name, DOB, Address, SS#) cannot cure the identifiable nature of the information given the specific nature of the request. The public's right to access to records pertaining to the policy-making responsibilities of the government and the individual's right to dignity and privacy are both recognized to [be] the principles of utmost importance. Providence Journal Company v. Sundlun, 616. A.2d 1131 (R.I. 1992). *** The records in [John Doe's] file contain personally identifiable information that is highly personal in nature. Therefore, the records are not public and I must decline to provide them. *** [2] Correspondence or notes from phone conversations about [John Doe] between Adrienne McGowan, Supervisor, Interstate Office, and [John Doe's father]. This information is not public pursuant to RIGL § 38-2-2(4)(A)(1)(b). It is personal individually identifiable information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *** This information is also not public pursuant to RIGL § 38-2-2(4)(K). Notes, working papers, and work product are not public documents. Ms. M[c]Gowan's personal notes regarding phone conversations between herself and [John Doe's father] are not public documents and therefore not subject to disclosure. [3] Correspondence about [John Doe's] case with Florida probation, parole or corrections officials during 2014 and 2015. This information is not public pursuant to RIGL § 38-2-2(4)(A)(1)(b). *** This information is also not public pursuant to RIGL § 38-2-2 (4)(S). Records to be kept confidential by federal law or regulation or state law, or rule of court are not pub[l]ic in nature. The documents contain confidential medical and healthcare related information and are therefore not public documents subject to disclosure."

The instant APRA complaint followed, alleging that the DOC's denial was improper and violated the APRA. In particular, then-Interim Executive Editor Areson wrote:

> "The Newspaper is pursuing a story in the public interest, which involves the DOC's handling of [John Doe's] case and his subsequent death. * * *

> We believe the DOC's refusal to provide these records violated the spirit and intent of R[I]GL §38-2-3. Since [John Doe] is deceased and the DOC's handling of his case is at issue, we do not believe significant privacy rights exist in these records."[2]

The above represents, in pertinent part, the entirety of The Providence Journal's submission in this case.

In response to your complaint, this Department received an affidavit from Attorney Kathleen M. Kelly, Chief Legal Counsel for the DOC. In the affidavit, Attorney Kelly stated, in pertinent part:

> "After reviewing the contents of the file I denied the request pursuant to RIGL § 38-2-2(4)(A)(1)(b), individuals' rights to privacy outweighed the Providence Journal's right to access the contents of the file. My conclusions were based upon the holdings in a number [of] court decisions pertaining [to] the balancing of interests between the public's right to access of policy-making functions of government verses an individual's right to dignity and privacy. *** The information in [John Doe's] file contained information that was personally identifiable to him and was of a private and personal nature. I denied the request for these documents. ***
>
> In my September 8, 2015 response regarding correspondence or notes contained in the probation file of phone conversations between Adrienne McGowan, Supervisor, Interstate Office, and [John Doe's father], the request for these documents was denied pursuant to RIGL § 38-2-2(4)(A)(1)(b). The information requested is personal and individually identifiable information[,] the disclosure of which would constitute a clearly unwarranted invasion of personal privacy for [John Doe], Adrienne McGowan and [John Doe's father]. The internal notes requested are specific to these individuals, therefore redaction cannot cure the personal and individually identifiable nature of the information. Given the specific nature of the request and the nature of relevant notes[,] this information if disclosed would be an invasion of the personal privacy of the three individuals. ***
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> In my September 8, 2015 response to the request for records/correspondence about [John Doe's] case while in Florida for drug treatment, as well as correspondence with Florida probation, parole or corrections officials during 2014 and 2015, I indicated these records were not public pursuant to RIGL § 38-2-2(4)(A)(1)(b), personal individually identifiable information[,] the disclosure of which is an unwarranted invasion of privacy . . . . Given the specificity of the request, all the records are identifiable to [John Doe]. Redaction or segregation cannot cure the identifiable nature of the information given the specific nature of the request."

The Providence Journal did not provide a rebuttal.

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[2] The APRA complaint did not allege that the DOC's denial was improper with respect to documents withheld under R.I. Gen. Laws § 38-2-2(4)(K) or § 38-2-2(4)(S).

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but, instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DOC violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA's dual purpose is to "facilitate public access to public records" and to "protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." See R.I. Gen. Laws § 38-2-1. Accordingly, among the documents expressly exempt from public disclosure are documents that are "[p]ersonnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq." See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). The plain language of this provision contemplates a "balancing test" whereby the "public interest" in disclosure is weighed against any "privacy interest."

This is not the first time that an APRA request has been made for a specific person's parole file. In Bernard v. Vose, 730 A.2d 30 (R.I. 1999), an inmate made an APRA request for his own parole board file. After recognizing that the APRA did not provide this inmate "an individualized right to review his board files," and instead that the APRA "opens public records to inspection by the general public," the Rhode Island Supreme Court determined that the requested parole board files were exempt from public disclosure. Id. at 31. In doing so, the Court explained:

> "[u]ndoubtedly, board records contain personal information about inmates. For example, in the instant case, petitioner requests the right to review reports about his participation in the Sex Offender Treatment Program, reports which potentially could contain intimate details about petitioner's sex life. If board records were subject to the Access to Public Records Act, those records would be open to the scrutiny of any member of the public who wanted to review them, contravening the purpose of the act." Id. at 32 (emphasis added).

While Bernard is significant to this finding, at least in part because "[u]ndoubtedly, board records contain personal information about inmates," id., the Providence Journal relates that the DOC violated the APRA because John Doe "is deceased and . . . we do not believe significant privacy rights exist in these records." Indeed, there is no privacy interest for John Doe, as "the right to privacy dies with the person." Clift v. Narragansett Television L.P., 688 A.2d 805, 814 (R.I. 1996). Nevertheless, the APRA's language is broad and does not specify whose "personal privacy" should be weighed. See R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

The United States Supreme Court has considered this issue and has expressly determined that when balancing the privacy interest versus the public interest, the privacy interest of the decedent's

family must be considered. See National Archives and Records Administration v. Favish, 541 U.S. 157, 171 (2004). The Rhode Island Supreme Court has repeatedly explained that in interpreting the APRA, guidance may be gleaned from the federal Freedom of Information Act (which was considered in Favish), see Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.3 (1989), and the Rhode Island Supreme Court has expressly adopted Favish. See The Providence Journal v. Department of Public Safety, 136 A.3d 1168, 1175 (R.I. 2016). Rhode Island case law also appears to recognize some measure of extension of privacy interests to the family of a decedent. See Clift, 688 A.2d at 815 ("[T]he reporter's conversation with the decedent did not, however, rise to the level of an actionable intrusion into the Clift's family's seclusion."). Furthermore, this Department has previously recognized such an extension in a public records case. See Casey v. Johnston Police Department, PR 02-02. As such, based on this precedent and the plain language of the APRA, we must examine the personal privacy in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) as it extends to the family of John Doe.

While the Providence Journal's APRA request and complaint focus on John Doe and argue that John Doe has no privacy interest in his parole board file because he is deceased, our in camera review of the parole board file finds discussion and information relating to third persons, including but not limited to John Doe's relatives. In Coleman v. Federal Bureau of Investigation, et al., 13 F.Supp.2d 75, 80 (D.D.C. 1988), a federal district court upheld the nondisclosure of certain documents under FOIA exemption 7(C), finding that "[u]pon inspection of the submitted documents, it is evident that release of any portion would reveal the identities of innocent third parties." Based on our in camera review, we similarly find that disclosure of the requested records would implicate the privacy interests of numerous third parties.

We must balance these privacy interests against the public interest. See R.I. Gen Laws § 38-2-2(4)(A)(I)(b). The United States Supreme Court has held that the FOIA:

> "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct." United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., 489 U.S. 749, 773 (1989).

The United States Supreme Court further explained that:

> "the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." Id. at 774–75 (emphasis added).

The Supreme Court closed Reporters Committee by holding:

> "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" Id. at 780; see also Favish, 541 U.S. at 166 ("where the subject of the documents is a private citizen, the privacy interest . . . is at its apex.") (internal quotations omitted).

Respectfully, we have already set forth the entirety—in relevant portion—of your submission to this Department and you have not identified a public interest sought to be advanced, as recognized by the APRA. At best, your complaint contends that the newspaper is pursuing a story, which you assert is in the public interest, concerning this case, DOC's handling of this case, and John Doe's subsequent death; but the United States Supreme Court has made clear that in a similar circumstance where information was sought for a news story, such interest, by itself, did not advance the public interest in the FOIA/APRA context. See Reporters Committee, 489 U.S. at 774 ("Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA."). The APRA employs a similar analysis. See Lyssikatos v. City of Pawtucket, PR 16-18. For this reason, even a negligible privacy interest outweighs a non-existent public interest in the APRA balancing analysis.

Two additional points warrant brief discussion. First, although the parole board files contain information regarding third persons, this third party information is not "reasonably segregable" through redaction. Indeed, even if the proper names were redacted, the requested information would still be identifiable to the family of John Doe. See Brady, 556 A.2d at 559 ("Even if all references to proper names were deleted, the principal's identity would still be abundantly clear from the entire context of the report."). Second, in addition to information regarding third parties, the parole board records also contain information pertaining to John Doe's medical and health care history. This information is deemed confidential by federal law and may not be publicly disclosed by the DOC even after John Doe's death. See 45 C.F.R. § 160.103(2)(iv) (2013) (defining "protected health information" under the Health Insurance Portability and Accountability Act as individually identifiable health information for a person who has been deceased for fifty years or less).

Here, based on the evidence presented, we conclude that rather than concerning the operations of the DOC, the evidence indicates that the information requested concerns private citizens "that happens to be in the warehouse of the Government." Reporters Committee, 489 U.S. at 774–75. While we certainly do not foreclose the possibility in the appropriate case the public interest could outweigh any privacy interests, in this case, we have been provided no evidence that the requested information would shed light on any government activity or that disclosure of the requested information would otherwise advance the public interest. See Shoemaker v. Rhode Island Department of Health, PR 13-15. As such, on this record, the privacy interests outweigh the public interests, and responsive health care information is independently exempt from public disclosure. For these reasons, we find no violation.

Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Sean Lyness

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: Kathleen M. Kelly, Esq.